Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

AETNA CASUALTY & SURETY COMPANY,
A CONNECTICUT CORPORATION,

Petitioner,

v.

THE HONORABLE JAMES O. ELLISON, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA,
AND, BRUCE A WATSON,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1447(d) is a bar to review "on appeal or otherwise" of an order remanding an action to a State District Court, under the following circumstances:

(a) The order of remand makes no explicit reference to 28 U.S.C. § 1447(c); and

(b) The order of remand does not hold the action to be one "arising under the workmen's compensation laws" of the state, and does not explicitly cite 28 U.S.C. § 1445(c), although the order does state the action to be "closely tied to the Workers' Compensation Act of the State of Oklahoma"; and

(c) The order of remand explicitly refers to the claims as "bad faith", which is a common law tort theory; and

(d) The State District Court from which the action had been removed lacks jurisdiction over claims arising under the state's Workers' Compensation Act, although it does have jurisdiction over common law "bad faith" torts?

2. Whether the bar to review "on appeal or otherwise" of an order of remand contained in 28 U.S.C. § 1447(d) is an unconstitutional deprivation of due process and equal protection under U.S. Const. Amend. V, where plaintiffs who oppose removal of an action to Federal Court may obtain appellate review of a refusal to remand, but an out of state defendant is denied a similar right of appellate review of an allegedly erroneous order remanding an action?

LIST OF PARTIES

The petitioner before this Court is the Aetna Casualty & Surety Company, a Connecticut corporation. Petitioner was originally named as a defendant in an action commenced in the District Court of Delaware County, State of Oklahoma, which petitioner sought to remove to the United States District Court for the Northern District of Oklahoma.

Pursuant to Supreme Court Rule 29.1, petitioner states that its parent corporation is Aetna Life & Casualty Company, and that its subsidiaries are Aetna National Accounts U.K. Ltd., Aetna Casualty Company of Connecticut, Aetna Excess and Surplus Lines Company, Aetna Lloyds of Texas Insurance Company, Aetna Casualty & Surety Company of Illinois, Aetna Casualty & Surety Company of Canada, Aetna Casualty & Surety Company of America, Executive Re, Inc., Farmington Casualty Company, Chelsea Insurance Company, Ltd., and Aetna Commercial Insurance Company.

The respondent in this action is Bruce A. Watson, a resident and citizen of Delaware County, Oklahoma; this respondent was the original plaintiff in the action commenced in the District Court of Delaware County, State of Oklahoma, and was the appellee in the appeal to the United States Court of Appeals for the Tenth Circuit, docket no. 94-5206.

Also named as a respondent is the Honorable James O. Ellison, Judge of the United States District Court for

LIST OF PARTIES – Continued

the Northern District of Oklahoma. This respondent presided over the underlying action once removal was sought from the District Court of Delaware County, State of Oklahoma, to the United States District Court for the Northern District of Oklahoma, and was named as respondent in a Petition for Writ of Mandamus and/or prohibition filed with the United States Court of Appeals for the Tenth Circuit, docket no. 94-5201.

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The Order of the United States Court of Appeals for the Tenth Circuit filed December 14, 1994, denying petitioner's Petition for Writ of Mandamus and/or Prohibition, docket no. 94-5201, is printed in the appendix hereto, at page 1a.

The Order of the United States District Court for the Northern District of Oklahoma remanding the underlying action to the District Court, State of Oklahoma, filed October 27, 1994, is printed in the appendix hereto at page 3a.

JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit denying Petitioner's Petition for Writ of Mandamus and/or Prohibition was filed with that Court December 14, 1994. No Petition for Rehearing was sought, and, accordingly, no order denying rehearing was entered.

The Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

U.S. Const. Amend. V.

> The judicial Power shall extend . . . to Controversies between two or more States; – between a State and citizens or another State; – between Citizens of different states; – between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the citizens thereof, and foreign States, citizens of subjects.

U.S. Const. Art. III § 2.

FEDERAL STATUTES

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the District Courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the District Court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

> A civil action in any State Court arising under the workmen's compensation laws of such state may not be removed to any District Court of the United States.

28 U.S.C. § 1445(c).

> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under § 1446(a). If at any time before final judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual

> expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State Court. The State Court may thereupon proceed with such case.

28 U.S.C. § 1447(c).

> An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State Court from which it was removed pursuant to § 1443 of this Title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).

OKLAHOMA STATUTES

> The [Workers' Compensation] Court is hereby designated and confirmed as a court of record, with respect to any matter within the limits of the jurisdiction, and within such limits the judges thereof shall possess the powers and prerogatives of the judges of the other courts of record of this state.

85 O.S. Supp. 1994 § 1.2(F).

> The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common-law or otherwise, for such injury, loss of services, or death, to the employer, or the spouse, personal

> representatives, parents, or dependents of the employee, or any other person.

85 O.S. 1991 § 12.

> The right of action to recover damages for personal injuries or death arising and occurring in employment as herein defined, except the right of action reserved to an injured employee or his dependents or other legal representatives in §§ 12 & 44 of this Title is hereby abrogated and all jurisdiction of the courts of this state over such causes, except as to the cause reserved to such injured employees or their dependents or other legal representative in §§ 12 & 44 of this Title is hereby abolished.

85 O.S. 1991 § 122.

STATEMENT OF THE CASE

Bruce A. Watson commenced two actions in the courts of the State of Oklahoma. The first was an action in the Oklahoma Workers' Compensation Court, pursuant to the Oklahoma Workers' Compensation Act; Aetna did not at any time seek to remove that action to a Federal District Court. In his workers' compensation claim, Watson alleged that he was injured in the course of his employment with Megan Coves Resort on July 9, 1991. Aetna provided workers' compensation insurance to Watson's employer. On December 13, 1991, the Oklahoma Workers' Compensation Court ordered temporary total disability payments and medical treatment. That order was affirmed by a three judge panel of the Oklahoma

Workers' Compensation Court on February 21, 1992. Watson's workers' compensation claim was eventually resolved by a joint petition procedure.

On August 31, 1993, Watson, as plaintiff, commenced a separate action in the District Court of Delaware County, State of Oklahoma, styled Bruce A. Watson, plaintiff v. the Aetna Casualty & Surety Co., a Connecticut corporation, defendant, docket no. CJ-93-229. Watson asserted a claim for the tort of "insurance bad faith" based upon an alleged failure to make the payments as ordered by the Oklahoma Workers' Compensation Court. Appendix E, pp. 20a – 24a.

Aetna removed Watson's "bad faith" tort action to the United States District Court for the Northern District of Oklahoma on November 3, 1993. Aetna invoked the Federal Court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1) because Watson is a citizen and resident of Oklahoma and Aetna is a corporation incorporated under the laws of a state other than Oklahoma, with its principal place of business in a state other than Oklahoma, and because the amount in controversy exceeded $50,000.00.

Watson moved to remand the action from Federal Court back to the District Court of Delaware County, State of Oklahoma, citing 28 U.S.C. § 1445(c). Aetna opposed remand on the grounds that the tort asserted by Watson's claim did not arise under the Oklahoma Workers' Compensation Act, but instead invoked common law principles, which made the action removable to Federal Court.

Watson filed a First Amended Complaint with the Federal District Court on March 4, 1994. Appendix D, pp.

15a-19a. Aetna then moved to dismiss Watson's First Amended Complaint arguing that it failed to state a claim upon which relief may be granted under Oklahoma Tort Law.

Watson's motion to remand was heard on September 30, 1994. Although the court initially recognized that the question was whether Watson's claim was "pure comp" or whether "it's something other than that", the court did not in fact find that Watson's action was "pure comp" and did not explicitly state that the action was unremovable under 28 U.S.C. § 1445(c). Instead, "the court's very limited analysis" held that the action was "so tied to the Workmen's Compensation Act that it more properly should be addressed by the State Court." Appendix C, pp. 6a, 13a; See Appendix B, pp. 3a-4a.

Aetna sought review of the remand order by Petitioning the United States Court of Appeals for a Writ of Prohibition and/or Mandamus (Docket No. 94-5201), and by commencing an Appeal under the collateral order doctrine (Docket No. 94-5206). Aetna argued that the order of the Federal District Court is "reviewable by appeal or otherwise" because the remand was not based upon an explicit finding of a "defect in removal procedure" either by specific reference to statute, 28 U.S.C. §§ 1445(c), 1447(c), or by an explicit recital or statutory language. Instead, the court's selection of phrasing that approximates to, while falling short of, the statutory language suggests that the court recognized that the action before it fell outside the bar to removal expressed in 28 U.S.C. § 1445(c).

The United States Court of Appeals denied Aetna's Petition for Writ of Mandamus and/or Prohibition by an Order filed December 14, 1994. The Appellate Court held it did not have jurisdiction to review the remand order, citing 28 U.S.C. §§ 1445(c), 1447(d). Appendix A, 1a-2a. It is this Order which is the subject of this Petition for a Writ of Certiorari. Aetna's separate appeal (Docket No. 94-5206) of the remand order remains pending before the United States Court of Appeals for the Tenth Circuit.

Petitioner submits the United States Court of Appeals erred in holding it lacked jurisdiction to review the remand order "by appeal or otherwise" and by denying Aetna's Petition for Writ of Mandamus and/or Prohibition.

Petitioner also submits that the bar to appellate review contained in 28 U.S.C. § 1447(d) is unconstitutional. Plaintiffs opposing removal may raise that issue on appellate review; defendants seeking to secure the federal tribunal to which they are constitutionally and statutorily entitled, may be granted no less.

REASONS FOR GRANTING A WRIT

A. The Court of Appeals Erred in Holding it Did Not have Jurisdiction to Review the Remand Order.

This court should grant certiorari because the United States Court of Appeals for the Tenth Circuit, by holding it did not have jurisdiction to review the order of remand "by appeal or otherwise", has decided a question of

substance in a manner inconsistent with 28 U.S.C. § 1447(d), and in such a manner as to deprive defendants properly invoking a Federal Court's removal jurisdiction of the equal protection of the laws, by refusing to entertain appellate review of an order of remand.

The United States Court of Appeals erred when it dismissed Aetna's Petition for Writ of Mandamus and/or Prohibition for lack of jurisdiction. Section 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 343 (1976). However, the prohibition is limited to the § 1447(c) grounds: "but we are not convinced that Congress ever intended to extend carte blanche authority to the District Courts to revise the Federal Statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." 423 U.S. at 351. Petitioner submits that the bar to appellate review must be strictly limited to orders which expressly state that there is "a defect in removal procedure" or that the Court "lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). An order which falls short of such an explicit statement does not clearly invoke § 1447(c), and would fall outside the § 1447(d) bar to review.

Actions "arising under the workmen's compensation laws" of a state may not be removed from state to Federal Court. 28 U.S.C. § 1445(c). However, that statute would not prevent removal of claim where the right of action is a judicially created tort, and not a part of the statutory workers' compensation scheme. See *Jones v. Roadway*

Express, 931 F.2d 1086, 1091 n.3 (5th Cir. 1991) (distinguishing unremovable statutory action for retaliatory discharge from removable judicially created claim) citing inter alia, *Powers v. Travelers Insurance Co.*, 664 F.Supp. 252, 254 (S.D. Miss. 1987) (Judicially created action for bad faith refusal to pay compensation benefits does not arise under workers' compensation act; 28 U.S.C. § 1445(c) does not bar removal).

The order of remand in this case does not contain an explicit reference to 28 U.S.C. § 1445(c) or to 28 U.S.C. § 1447(c). The Court approximates to, but falls short, of invoking the statutory language that the underlying action is one "arising under the workmen's compensation law" of the State of Oklahoma. Instead, the Federal District Court "f[ou]nd[ ] that the bad faith claims asserted by plaintiff are so closely tied to the workers' compensation act of the State of Oklahoma that such matters should be addressed by the District Court for the State of Oklahoma, . . . " Appendix B, p. 3a. The Order specifically identifies the claim as one for "bad faith"; it should be interpreted as expressing a preference that such a claim "should be addressed" by the state court. Thus, the language of the order suggests a discretionary remand rather than a finding that the action was unremovable.

"A remand order based on a District Court's perceived discretion is not ordered pursuant to § 1447(c)." *Albertson's Inc. v. Carrigan*, 982 F.2d 1478, 1480 (10th Cir. 1993); See also *Sheetmetal Workers' International Assoc. v. Seay*, 693 F.2d 1000 (10th Cir. 1982) (remand based upon a conclusion that a State Court would be "the most equitable forum" subject to review); *Kolibash v. Committee on*

Legal Ethics of the West Virginia Bar, 872 F.2d 571 (4th Cir. 1989) (appellate review available where action was remanded on grounds that "licensure of professionals is basically a state function"); *Grassi v. International Paper Co.,* 961 F.2d 558 (5th Cir. 1992) (remand "in the spirit of federalism" may be reviewed). An order remanding state tort claims against an employer was vacated in *Scott v. Machinists Automotive Trades District Lodge No. 190 of Northern California,* 827 F.2d 589 (9th Cir. 1987). The Appellate Court held the remand orders reviewable because "they were discretionary dismissals based on a determination that the claims would be better heard in State Court." *Id.* at 592.

Moreover, the action was removed from a Court that did not have jurisdiction over a workers' compensation claim. The "insurance bad faith" claim asserted by Watson could not be one "arising under the workmen's compensation law" of Oklahoma. Exclusive jurisdiction for such claims lies with the Oklahoma Workers' Compensation Court. 85 O.S. 1991 § 122. "The Workers' Compensation Court is vested with *exclusive* jurisdiction to determine and enforce a compensation risk carrier's liability to a claimant." *State Insurance Fund v. Brooks,* 755 P.2d 653, 656 Okla. 1988) (emphasis original) (footnote omitted). The Oklahoma Workers' Compensation Court is a Court of Record, distinct from the District Courts of that state. 85 O.S. Supp. 1994 § 1.2(F). Only limited remedies are available under the Oklahoma Workers' Compensation Act. 85 O.S. 1991 & Supp. 1994 §§ 11, 12. The underlying action, which Petitioner's sought to remove to Federal Court, was commenced in the District Court of Delaware County, not in the Oklahoma Workers'

Compensation Court. The asserted claim was "insurance bad faith", a common-law tort and *not* one of the limited remedies under the Oklahoma Workers' Compensation Act. Appendix E. Insofar as this claim fell within the jurisdiction of the District Court of Delaware County, it could not be one "arising under the workers' compensation law" of Oklahoma. Section 1445(c) would not bar removal of that claim.

The fact that the Federal District Court remanded the action to the District Court of Delaware County is a further indication that the claim is not one "arising under the workmen's compensation law" of Oklahoma. The Federal Court could not remand the action to a State Court that did not have jurisdiction. See *Bomer-Blanks Lumber Co. Inc. v. Oryx Energy Co.*, 837 F.Supp. 769 (N.D. La. 1993) (action dismissed rather than remanded, as state law restricted jurisdiction to court other than one from which action had been removed).

The existence of a "bad faith" tort claim in the workers' compensation context is unsettled under Oklahoma Law. *Goodwin v. Old Republic Insurance Co.*, 828 P.2d 431 (Okla. 1992) raised the issue, but left many questions unresolved. Nevertheless, the Court carefully distinguished a common law "bad faith" tort claim from one governed by the Workers' Compensation Act: "By definition: *intentional, willful acts are not within the purview of the Workers' Compensation Act.*" *Goodwin*, 828 P.2d at 434 (emphasis original) (footnote omitted). "It is undisputed that intentional acts are statutorily excluded under the Workers' Compensation Act." *Id.* at 434. Thus, the kind of tort considered by the plurality would be one which fell outside the Workers' Compensation Act, rather than one

which arises under it. That is the only kind of action which could have been brought in the District Court of Delaware County; Section 1445(c) does not bar removal of such a claim.

In a more recent opinion, the Oklahoma Supreme Court held that an employee could not assert a "bad faith" tort against and *employer* in a State District Court. *Whitson v. Oklahoma Farmers Union Mutual Insurance Co.*, 66 Okla. B.J. 351 (Okla. 1995). However, this only provides additional authority for the proposition that an "insurance bad faith" tort commenced in a District Court of Oklahoma is not a claim "arising under" the Oklahoma Workers' Compensation Act, and may be removed to Federal Court consistent with § 1445(c).

Therefore, the kind of claim Watson attempted to assert was not one arising under the Workers' Compensation Act, but a common-law tort. That action was properly removed to Federal Court, and the order of remand was in error. That error was compounded by the Appellate Court's conclusion that it lacked jurisdiction to review that order.

B. The Bar on Appellate Review is Unconstitutional

This court should grant certiorari because the bar on appellate review "by appeal or otherwise" in 28 U.S.C. § 1447(d) is an unconstitutional deprivation of due process and a denial of equal protection under U.S. Const. Amend. V. The Tenth Circuit court of Appeals relied upon that statute when it dismissed Petitioner's Petition for Writ of Mandamus and/or Prohibition. Although it may

be the case that a right to appellate review is not mandated in all circumstances by due process, such a right of review may not be afforded only to some litigants and denied to others, consistent with due process and equal protection.

The Constitution provides Federal Court "diversity jurisdiction" for the benefit of a special class of litigants who may be apprehensive of defending claims against them in the courts of a state of which they are not citizens. U.S. Const. Art. III, § 2. Such a constitutionally protected class may not be denied a right of review when review is allowed as a matter of course to plaintiffs, litigants for whom the Constitution does not express a similar special concern.

For example, in *Jones v. Roadway Express*, 931 F.2d 1086, the plaintiff, a terminated truck driver, obtained appellate review as a matter of course, and among the issues raised was the denial of his Motion to Remand. The Court of Appeals held that a statutorily created "retaliatory discharge" action arose under the Workers' Compensation Law of Texas, and required remand of the action pursuant to 28 U.S.C. § 1445(c). 931 F.2d at 1092. *Jones v. Roadway*, provides only one example of how a party opposing removal may obtain review "by appeal or otherwise" of a decision of a Federal District Court to retain jurisdiction. As a matter of fundamental fairness, the same right of review must be extended to parties who allege error in a Federal District Court's decision to remand an action. Appellate review of an allegedly erroneous District Court decision is part of the process; although a right of appeal may not be present in every instance, it cannot be allowed to some but denied to other

litigants consistent with due process and equal protection.

This Court has recognized a balancing test to determine what procedures are required by due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The first factor, the private interest affected, is the right of an out-of-state defendant to a Federal forum for a trial of the claims asserted against it. This right is acknowledged in the Constitution, which provides that "the judicial power shall extend . . . to controversy . . . between citizens of different states; . . . " U.S. Const. Art. III, § 2. This constitutional power was implemented by Congress enacting the statutes providing both for the diversity jurisdiction of Federal Courts, and for the removal of actions by an out-of-state defendant to Federal Court, where diversity exists. 28 U.S.C. § 1332, 1441. Thus, the right of an out-of-state defendant to a Federal forum is of constitutional dimension:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the

> possible fears and apprehensions of suitors that it has established national tribunals for the decision of controversies between aliens and a citizen or between citizens of different states. Aliens, or citizens of different states are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision because they are allowed to sue by a corporate name.

The Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). That is, out-of-state defendants are a class for which the Constitution has a special concern. That class may not be deprived of procedures, including appellate review, that are available to other litigants.

> A party otherwise entitled to appeal who, by the construction of a statute, is prevented from doing so, where such right is given to all others in similar cases, is thus deprived of the right of due process of law.

16A Am. Jur.2d "Constitutional Law", § 859 pp. 1082-83 (1979), citing *State ex rel. J. Hahn Bakery Co. v. Anderson*, 269 Mo. 381, 190 S.W. 857 (1916). Even if appellate review is not, by itself, an essential element of "due process", it cannot be allowed to some and denied to others consistent with that Constitutional guarantee. 190 S.W. at 858. Just as the seeds of due process are found in chapter 39 of Magna Carta, so chapter 61 recognized the right to petition for redress of wrong by a King's Justiciar. Blackstone considered a hierarchy of courts with appellate review to be "[a]n institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policies; . . . " 3 W. Blackstone *Commentaries* *31 (1768).

Therefore, the private interest at stake is that of an out-of-state defendant to a federal forum for trial of an action, coupled with the interest any litigant has in appellate review to correct a perceived error in an erroneous action by a Trial Court.

The second factor in the *Mathews v. Eldridge* balancing test is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335. This Court has noted that the bar on review in 28 U.S.C. § 1447(d) extends even to an order that "might be deemed erroneous by an Appellate Court." *Thermtron,* 423 U.S. at 351. The effect of § 1447(d) is to eliminate any "procedural safeguards" against the possibility of an erroneous deprivation of a defendant's right to a Federal forum. This absence of procedural safeguards must be weighed against the presence of safeguards when a Federal Court erroneously retains jurisdiction of a case. See *Jones v. Roadway,* supra. The allowance of review of a remand order "by appeal or otherwise" would be an additional "procedural safeguard" that would ensure out-of-state defendants that full measure of process which is their due.

The third factor of the *Mathews v. Eldridge* balancing test is "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail." 424 U.S. at 335. The governmental interest in denying review of remand orders cannot be alleviating a Federal Court's case load:

> That justice may move more slowly in some Federal Courts than in their state counterparts is not one of the considerations that Congress has permitted the District Courts to recognize in passing on remand issues.

Thermtron, 423 U.S. at 351. The elimination of a legitimate invocation of a Federal Court's diversity jurisdiction cannot be a governmental interest underlying § 1447(d). Additionally, the policies enunciated in *Bank of United States v. Deveaux*, supra, establish that there is a real governmental interest in the existence of diversity jurisdiction, and in the maintenance of suits between citizens of different states in a Federal Tribunal.

The interest promoted by § 1447(d) is not so much a governmental interest, as a private interest in speedy litigation:

> There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues (citation omitted) Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an Appellate Court.

Thermtron, 423 U.S. at 351. However, the specific means adopted to that end are not narrowly tailored to avoid "protected litigation of jurisdictional issues." Such litigation may still occur where the District Court declines to remand an action, and the issue is reasserted on appeal, as in *Jones v. Roadway*, supra. In that case, after the litigants proceeded in Federal Court through to Summary Judgment, the Appellate Court ordered the matter

remanded to State Court. The improper removal issue could also be raised on appeal after trial on the merits, or in any of a number of other situations in which a party who opposes removal pursues the issue on appeal. Therefore, "protracted litigation" is not avoided by declaring only orders remanding an action to be unreviewable by appeal or otherwise. In contrast, an interest in avoiding protracted litigation could be readily furthered by a procedure which allows immediate appeal of any order on a motion to remand, either granting or denying said motion. This could be by Petition for Writ of Mandamus and/or Prohibition, or by certified interlocutory appeal, or some other such device. Such a procedure would allow all parties the same right to appellate redress of an order they considered erroneous. All parties would be granted equal protection, and all parties would be due the same process.

In contrast, the current procedure falls short of any appearance of fundamental fairness. A remand order which mechanically recites section 1447(c) or its language is immune to review, however erroneous, whereas an order that "provides a reason unrelated to § 1447(c)" is reviewable. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994). In the current procedure, form prevails over substance, at the expense of fundamental fairness.

In summary, petitioner submits that the complete bar of "review by appeal or otherwise" of an order directing remand of an action, but not of an order denying remand, as set forth in 28 U.S.C. § 1447(d) is unconstitutional. It denies a right of appellate review to out-of-state defendants who invoke a Federal Court's constitutionally diversity jurisdiction, although plaintiff's may seek

review "on appeal or otherwise" of a District Court Order refusing to remand an action. Therefore, the bar in review does not provide all litigants the equal protection of the laws, and deprives out-of-state defendants that full measure of process which is their due.

CONCLUSION

WHEREFORE, petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the Order of the United States Court of Appeals for the Tenth Circuit in this action. In the event that this petition is granted, petitioners pray that the order of the Appellate Court be reversed, and that it be directed to accept jurisdiction and review the order of the United States District Court for the Northern District of Oklahoma, remanding the underlying action to the District Court of Delaware County, State of Oklahoma.

Respectfully submitted,

James K. Secrest, II,* OBA #8049
Edward J. Main, OBA #11912
Roger N. Butler, Jr., OBA #13668
Secrest, Hill & Folluo
7134 S. Yale, Ste. 900
Tulsa, Oklahoma 74136
(918) 494-5905

Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AETNA CASUALTY & SURETY COMPANY, a Connecticut corporation, Petitioner, v. HONORABLE JAMES O. ELLISON, Judge of the United States District Court for the Northern District of Oklahoma, Respondent.	)	No. 94-5201 (Filed Dec. 14, 1994)

ORDER

Before TACHA and BRORBY, Circuit Judges.

This is an original proceeding in the nature of mandamus. Petitioner seeks an order directing the district court to vacate its order remanding case No. 93-C-985-E to the state court from which the case had been removed and to exercise jurisdiction over the case.

Upon consideration thereof, the petition is denied. The district court remanded the case because of a defect in removal procedure in that the case was removed in violation of 28 U.S.C. § 1445(c). The court therefore does not have jurisdiction to review the district court's order.

28 U.S.C. § 1447(d); *Gravitt v. Southwestern Bell Tel Co.*, 430 U.S. 723 (1977) (per curiam).

Entered for the Court

PATRICK FISHER, Clerk

By /s/ Barbara Schermerhorn
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OKLAHOMA

BRUCE A. WATSON, Plaintiff, -v- THE AETNA CASUALTY AND SURETY COMPANY, a Connecticut Corporation, Defendant.	)	No. 93-C-985-E (Filed Oct. 27, 1994)

ORDER

COMES ON for consideration and hearing before the undersigned Judge of the United States District Court on the 30th day of September, 1994, Plaintiff's Motion for Remand. The Court, being well and fully advised in the premises, finds that the bad faith claims asserted by Plaintiff are so closely tied to the Workers' Compensation Act of the State of Oklahoma that such matters should be addressed by the District Court for the State of Oklahoma, and therefor, Plaintiff's Motion for Remand should be and is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled and numbered cause be and is hereby remanded to the District Court of Oklahoma, in and for Delaware County.

/s/ JAMES O. ELLISON
Honorable James O. Ellison
Judge of the United
States District Court

APPROVED AS FOR FORM AND CONTENT:

/s/ Bryce A. Hill
Bryce A. Hill
Counsel for Plaintiff

/s/ R. Butler, Jr.
James K. Secrest, II
Roger N. Butler, Jr.
Counsel for Defendant

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUCE A. WATSON, Plaintiff,	)	
V.	)	
AETNA CASUALTY AND SURETY, COMPANY, a Connecticut Corporation, Defendant.	)	No. 93-C-985-E

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON SEPTEMBER 30, 1994

HEARING ON MOTION TO REMAND

BEFORE THE HONORABLE JAMES O. ELLISON, Chief Judge.

APPEARANCES:

For the Plaintiff: Mr. Bryce A. Hill
Hill & Knight
717 South Houston, Suite 508
Tulsa, Oklahoma 74127

For the Defendant: Mr. James K. Secrest
Secrest, Hill & Folluo
7134 South Yale, Suite 900
Tulsa, Oklahoma 74136

[p. 2] PROCEEDINGS

September 30, 1994

THE COURT: Please be seated. Good afternoon. We have you both on the same side of the table. You should work out this problem.

MR. SECREST: We were close, Judge.

THE COURT: Very close.

MR. SECREST: Real close.

THE COURT: Well, this is one of the most interesting issues that I have had presented because what the Court is going to have to determine is whether we are talking about workmens' compensation or something else. And the defendant has filed a motion to dismiss but the Court can't address that until the plaintiff has an opportunity to present the motion to remand and the Court has acted on that. And of course if its pure comp it will be remanded; if it's something other than that it will stay here, then we will address it is [sic] motion to dismiss.

MR. SECREST: Yes.

THE COURT: So I will hear from plaintiff first.

MR. HILL: Your Honor, on our motion to remand we – this case is somewhat unusual in that as far as I know there has only been one of them tried, and that was two weeks ago in Tulsa County, an insurance bad faith on a workers' compensation claim. There has been several filed and I think even Judge [p. 3] Brett has addressed a few of them here in this court.

THE COURT: But they weren't exactly postured, I mean they weren't postured precisely like this.

MR. HILL: That's true. They are a little different although they arose out of the workers' compensation court.

THE COURT: Right.

MR. HILL: We would liken this case to the Cooper case that was addressed by Judge Brett, and in that case he remanded the action back to Tulsa County District Court pursuant to Section 1445(c), and that's the case we just tried two weeks ago. This case is similar. And the cause of action of insurance bad faith as it relates to a workers' compensation claim comes from Goodwin, and they go through an extended analysis as to why workers' compensation insurance is not excluded from this duty of good faith and fair dealing.

Now the language in there is somewhat ambiguous. It talks about there has to be a nonpayment of an award, of an order and of a claim. It's our position that while that is the thing they were talking about in Goodwin, that order was 18 days late being paid and they said that wasn't in and of itself bad faith or actionable bad faith. They assumed that there was such a cause of action on the workers' compensation insurance or carrier.

THE COURT: Of course what you are urging here is that the defendant's appeal, the defendant's appeal really [p. 4] constituted bad faith, aren't you?

MR. HILL: Well the appeal – and the thing that Goodwin doesn't address that I just don't see how we can overlook is that there are statutory provisions which is

statutory law that if they receive notice of an injury, there is a workers' compensation court rule that within 20 days they must start making temporary totally [sic] disability payments and provide medical treatment. There is Section 22.5 in the Oklahoma statute that say [sic] that once they receive notice they are to provide temporary total disability and medical payments within 10 days. So they had notice. This man was hurt in August of 1991, we went to trial in December of 1991. Obviously they had notice but they didn't pay for medical treatment or for temporary disability. One of our elements of damage includes that he had to have surgery, and Dr. Simmons would say that had he been provided treatment earlier the surgery may have been avoided.

THE COURT: What's available for relief under the compensation laws in regard to any late payments? Is there any sort of penalty that can be imposed? I'm not talking about bad faith.

MR. HILL: There can be. There are instances where, if in such as this you don't have a defense, you can be awarded at the court's discretion a 10 percent penalty, and that may be a 15 percent penalty now, that can be added to a temporary [p. 5] total disability award. But that is not – really it's not a punitive type provision, it's more of a –

THE COURT: Like interest.

MR. HILL: An interest type provision to try to enforce people to pay the benefits when they are due. And that is under a statute. Now that's not addressed in Goodwin but I don't see how you can ignore Oklahoma law and say an order of the court has got to be enforced

on the one hand but a legislative enactment doesn't have to be on the other hand. It doesn't preclude an action for violation of the compact. They have obligations and duties because it is couched in terms of shall and will pay and what type thing.

And Goodwin also follows the case line of Christian, Timmons, McCorkle and makes a bad faith claim. All acts of bad faith, while that may be a tort, the things that gave rise, all acts of bad faith, the failure to pay, the failure to deal in good faith, failure to present a defense in this case whatsoever, arose in the workers' compensation court which would make this claim workers' compensation related because it deals strictly with our statutes and workers' compensation law and the workers' compensation court, and that is an Oklahoma matter which under Title, 25 U.S.C. Section 1445 would necessarily mean it should be remanded and handled in state court just like Cooper was that Brett handled back in 1991.

THE COURT: How do you deal with Goodwin?

[p. 6] MR. HILL: How do I deal with Goodwin?

THE COURT: Yes.

MR. HILL: Well, Goodwin is the only case we have that is published right now. I'm sure the case we tried two weeks ago will eventually be published and hopefully answer some questions for us. Goodwin on page 436 of the Goodwin opinion refers to nonpayment of a claim. It says nonpayment of a claim will give rise to a cause of action for bad faith. Other places in the opinion of Goodwin talks about orders, but there is one specific

place, a paragraph on page 436 of Goodwin where it talks about a claim, not talking about an order.

The thing that we have here that was not addressed in Goodwin, which I think distinguishes them, Goodwin was talking about you must have a court order that's not paid.

THE COURT: That was Judge Brett's wording.

MR. HILL: Okay, and that was Judge Brett's wording. But in this instance we have an Oklahoma statute that was not complied with which I think should carry at least equal, if not more weight, since that was a statute enacted by our legislature and couldn't even be appealed. A court order can be appealed. This was a legislative mandate that was not followed. In that respect this is maybe a step beyond Goodwin but it certainly is one that can easily be made because the statutory enactment must be followed just like a court order must be followed.

[p. 7] THE COURT: Didn't Judge Brett in Cooper really find that bad faith could not be developed until after a court order had been entered, wasn't that the wording?

MR. HILL: He may have worded it that way, Your Honor. I think what Judge Brett did not understand and what was not presented in that instance either is the fact that you have statutory obligations that you must meet if you are going to write workers' compensation insurance in the State of Oklahoma. Also in many instances there is even a specific statute that will tell you

a Court order is not required for you to comply with this. It's in Rule 14.

THE COURT: Well, in this case didn't you have a court order that was appealed?

MR. HILL: It was appealed, there was a court order. But our complaint –

THE COURT: Goes to earlier, I know.

MR. HILL: Is earlier, previous to that.

THE COURT: The 20 day period is what you are talking about.

MR. HILL: Yeah, the 10 day period and the 20 day period, and here we had to go six months' went to court and they didn't present a defense. They didn't call a witness, they didn't present a defense.

THE COURT: And then they appealed it.

MR. HILL: Then they appealed it. They still didn't [p. 8] have a defense. Went to court and it unanimously affirmed. And that is the problem we had with this. They ignored statutory mandates to pay those benefits under compact. If they had a legitimate defense we don't argue with the fact they have the right to litigate a claim, but they have got to litigate it with something.

THE COURT: Okay. Thank you very much.

MR. SECREST: Your Honor, I understand the Court's dilemma in this case.

THE COURT: It is a very close and difficult question the way it is posed.

MR. SECREST: And I'm not sure there is anything I can say or offer to the Court that the Court isn't already aware of except to point out that, of course, we rely heavily on Judge Brett's opinion in the case and more importantly the Clinton case, that was another case that we were involved in, and for the reasons mentioned in our brief suggest to the Court that not only on our motion to dismiss but also on the motion to remand, that the language in that order, even though it's not on all fours, the facts are not on all fours, should at least be somewhat persuasive to this Court. No matter what counsel wants to call the nature of his lawsuit it's still, I think when you get down to the bare bones, a bad faith lawsuit which smacks in the eyes in the face of the common law a violation of what he would consider or what I would consider to be a common [p. 9] law versus a statutory or some type of workers' compensation, violation of a workers' compensation court order. That being the case, no matter what color you paint the wall, he's still asking for recovery from this Court or at least in the Delaware County court so far which we have removed here, under a cause of action based on workers' comp but not necessarily a violation from any sort of workers' compensation order as such. And I can stand here and talk for a long time and I don't think I could enlighten you at all.

THE COURT: That's your position and I understand.

MR. SECREST: Thank you.

THE COURT: Well, it is an extremely close call. However, I feel that because plaintiff is calling upon a provision and relying upon a provision of the workmens'

compensation law as far as payment is concerned, and under the facts of this case whatever bad faith claim is asserted certainly falls under the umbrella of the workmens' compensation act and the Court feels that it is so tied to the workmens' compensation act that it more properly should be addressed by the state court and I'm going to grant the motion to remand and I'll direct the plaintiff to prepare an order and submit it to opposing counsel reflecting the Court's very limited analysis and submit it back to me within 10 days, if you would do that.

It's good to see both of you gentlemen.

[p. 10]MR. SECREST: Thank you, sir.

MR. HILL: Thank you, Judge.

(Recess).

A TRUE AND CORRECT TRANSCRIPT.

CERTIFIED: /s/ Glen R. Dorrough
Glen R. Dorrough
United States Court Reporter

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRUCE A. WATSON, Plaintiff, -v- THE AETNA CASUALTY AND SURETY COMPANY, a Connecticut Corporation, Defendant.	)	No: 93-C-985-E (Filed Mar. 4, 1994)

FIRST AMENDED COMPLAINT

COMES NOW the Plaintiff, Bruce A. Watson, and for his causes of action against Defendant, The Aetna Casualty and Surety Company, alleges and states:

I.

At all times material herein, Plaintiff, Bruce A. Watson, was a resident and citizen of Delaware County.

At all times material herein, Defendant, The Aetna Casualty and Surety Company was a corporation organized and existing under the laws of the state of Connecticut and conducting business in Delaware County, State of Oklahoma and may be served through the Commissioner of Insurance as service agent at 48 Will Rogers Memorial Office Building, Oklahoma City, Oklahoma 73105.

II.

INSURANCE BAD FAITH

On July 9, 1991 Plaintiff, Bruce A. Watson, was involved in an on the job accident which arose out of and in the scope of his employment with Meghan Coves Resort. As a result of said accident, Plaintiff sustained permanent injuries including but not limited to injuries to his back, right knee, neck, and right shoulder.

III.

Plaintiff caused an Employee's First Notice of Accidental Injury and Claim for Compensation (Form 3) to be filed with the Workers' Compensation Court for the State of Oklahoma on or about August 7, 1991.

IV.

At the time of the above mentioned injury Meghan Coves Resort was insured under a policy of insurance issued by the Defendant, The Aetna Casualty and Surety Company, and that said insurance policy provided workers' compensation coverage to Plaintiff, Bruce A. Watson.

V.

The on the job injuries sustained by Plaintiff, Bruce A. Watson, met the requisite conditions precedent to recover Workers' Compensation Benefits under the above mentioned insurance policy and the laws of the State of Oklahoma.

VI.

After trial on the issues of temporary total disability and other benefits, Judge Ben P. Choate, Jr., of the Oklahoma Workers' Compensation Court issued an Order on December 13, 1991, finding that Plaintiff, Bruce A. Watson, was entitled to temporary total disability benefits and medical treatment.

VII.

The December 13, 1991, Order of Judge Choate was appealed to the Workers' Compensation Court Three Judge Panel with the Order being unanimously affirmed after oral arguments on February 21, 1992.

VIII.

The Order On Appeal of the Three Judge Panel was not appealed by the Defendant and became a final Order on March 20, 1992.

IX.

Plaintiff was an employee of Meghan Coves Resort at the time of his on the job injury and Defendant had a duty to act in good faith and deal fairly with Plaintiff in payment and administration of workers' compensation benefits.

X.

In failing to provide workers' compensation benefits to Plaintiff without just cause and without any defense to

the claim constitutes willful, wanton and with gross disregard for the rights of Plaintiff. Further, the actions of Defendant, by and through its agents and employees, constitutes gross negligence and entitles Plaintiff to recover punitive damages from Defendant.

XI.

At all times material herein Defendant was acting by and through its agents, employees, and representatives who were acting within the course, scope and authority of their agency and employment.

XII.

Due to Defendant's failure to act in good faith and deal fairly with Plaintiff by refusing to provide payments of temporary total disability benefits and in failing to provide required medical treatment in a timely manner, Plaintiff was required to undergo surgery, has endured extreme emotional and physical pain and suffering, and has suffered an increase in permanent disability, embarrassment, impaired earning capacity, loss of income and has been otherwise damaged.

XIII.

Due to Defendant's failure to act in good faith and deal fairly with Plaintiff by refusing to provide payments of temporary total disability benefits and in failing to provide required medical treatment in a timely manner, Plaintiff will in the future endure extreme emotional and physical pain and suffering and will suffer an additional

increase in permanent disability, embarrassment, impaired earning capacity, loss of income and will continue to be otherwise damaged.

WHEREFORE, premises considered, Plaintiff prays for judgment against Defendant in an amount in excess of $10,000.00 for actual damages and an amount in excess of $10,000.00 for punitive damages together with the costs of this action, interest at the statutory rate and a reasonable attorney's fee.

Respectfully Submitted,

HILL & KNIGHT

/s/ Bryce A. Hill
Bryce A. Hill O.B.A. #11346
717 S. Houston, Suite 508
Tulsa, Oklahoma 74127
(918) 584-2889

JURY TRIAL DEMANDED
ATTORNEY LIEN CLAIMED

/s/ Bryce A. Hill
Bryce A. Hill

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 1994 I mailed a true and correct copy of the above and foregoing First Amended Petition to:

Melvin C. Weiman, Esq.
7134 South Yale, Suite 900
Tulsa, Oklahoma 74136

with proper postage attached thereto fully prepaid.

/s/ Bryce A. Hill
Bryce A. Hill

APPENDIX E

THE DISTRICT COURT OF DELAWARE COUNTY
STATE OF OKLAHOMA

BRUCE A. WATSON, Plaintiff, -v- THE AETNA CASUALTY AND SURETY COMPANY, a Connecticut Corporation, Defendant.	)	No. C-93-229

PETITION

COMES NOW the Plaintiff, Bruce A. Watson, and for his causes of action against Defendant, The Aetna Casualty and Surety Company, alleges and states:

I.

At all times material herein, Plaintiff, Bruce A. Watson, was a resident and citizen of Delaware County.

At all times material herein, Defendant, The Aetna Casualty and Surety Company was a corporation organized and existing under the laws of the state of Connecticut and conducting business in Delaware County, State of Oklahoma and may be served through the Commissioner of Insurance as service agent at 48 Will Rogers Memorial Office Building, Oklahoma City, Oklahoma 73105.

II.

INSURANCE BAD FAITH

On July 9, 1991 Plaintiff, Bruce A. Watson, was involved in an on the job accident which arose out of and in the scope of his employment with Meghan Coves Resort. As a result of said accident, Plaintiff sustained permanent injuries including but not limited to injuries to his back, right knee, neck, and right shoulder.

III.

Plaintiff caused an Employees First Notice of Accidental Injury and Claim for Compensation (Form 3) to be filed with the Workers' Compensation Court for the State of Oklahoma on or about August 7, 1991.

IV.

At the time of the above mentioned injury Meghan Coves Resort was insured under a policy of insurance issued by the Defendant, The Aetna Casualty and Surety Company, and that said insurance policy provided workers' compensation coverage to Plaintiff, Bruce A. Watson.

V.

The on the job injuries sustained by Plaintiff, Bruce A. Watson, met the requisite conditions precedent to recover Workers' Compensation Benefits under the above mentioned insurance policy and the laws of the State of Oklahoma.

VI.

After trial on the issues of temporary total disability and other benefits, Judge Ben P. Choate, Jr., of the Oklahoma Workers' Compensation Court issued an Order on December 13, 1991, finding that Plaintiff, Bruce A. Watson, was entitled to temporary total disability benefits and medical treatment.

VII.

The December 13, 1991, Order of Judge Choate was appealed to the Workers' Compensation Court Three Judge Panel with the Order being unanimously affirmed after oral arguments on February 21, 1992.

VIII.

The Order On Appeal of the three Judge Panel was not appealed by the Defendant and became a final Order on March 20, 1992.

IX.

Plaintiff, Bruce A. Watson, received his lump sum payment and one weekly payment in a timely fashion, thereafter, without any just cause whatsoever, Defendant arbitrarily, deliberately, with gross disregard for the rights of Plaintiff and without any reasonable grounds or beliefs to do so ceased to pay the remaining Court ordered benefits to the Plaintiff.

X.

Defendant acted unfairly, in bad faith, in failing to provide continuing disability payments and medical treatment benefits as ordered by the Workers' Compensation Court.

XI.

Plaintiff was an employee of Meghan Coves Resort at the time of his on the job injury and Defendant had a duty to act in good faith and deal fairly with Plaintiff in payment and administration of workers' compensation benefits.

XII.

In failing to provide workers' compensation benefits to Plaintiff as ordered by the Workers' Compensation Court the actions of Defendant were willful, wanton and with gross disregard for the rights of Plaintiff. Further, the actions of Defendant, by and through its agents and employees, constitutes gross negligence and entitles Plaintiff to recover punitive damages from Defendant.

XIII.

At all times material herein Defendant was acting by and through its agents, employees, and representatives who were acting within the course, scope and authority of their agency and employment.

XIV.

Due to Defendant's failure to act in good faith and deal fairly with Plaintiff by refusing to provide payments of temporary total disability benefits and in failing to provide required medical treatment in a timely manner, Plaintiff has endured extreme emotional and physical pain and suffering and has suffered an increase in permanent disability, embarrassment, impaired earning capacity, loss of income and has been otherwise damaged.

XV.

Due to Defendant's failure to act in good faith and deal fairly with Plaintiff by refusing to provide payments of temporary total disability benefits and in failing to provide required medical treatment in a timely manner, Plaintiff will in the future endure extreme emotional and physical pain and suffering and will suffer an additional increase in permanent disability, embarrassment, impaired earning capacity, loss of income and will continue to be otherwise damaged.

WHEREFORE, premises considered, Plaintiff prays for judgment against Defendant in an amount in excess of $10,000.00 for actual damages and an amount in excess of $10,000.00 for punitive damages together with the costs

of this action, interest at the statutory rate and a reasonable attorneys fee.

Respectfully Submitted,

HILL & KNIGHT

/s/ Bryce A. Hill
Bryce A. Hill O.B.A. #11346
717 S. Houston, Suite 508
Tulsa, Oklahoma 74127
(918) 584-2889

JURY TRIAL DEMANDED

ATTORNEY LIEN CLAIMED
/s/ Bryce A. Hill
Bryce A. Hill